N.M. ROTHSCHILD & SONS (SINGAPORE) LTD. & ORS

v.

CHONG SIEW KUAN

HIGH COURT, SINGAPORE
LP THEAN J
[SUMMONS-IN-CHAMBERS NO. 12604 OF 1986]
16 AUGUST 1988

CONTRACT: *Banking - Syndicated loan facilities granted - Defendants in all four (4) appeals were guarantors to the loan - Defendants alleged misrepresentation, failure of condition precedent in the Agreement and breach of duty of disclosure - Whether valid defences.*

The 4 appeals against the Registrar's decision allowing judgment against the 4 defendants were based on the same facts and law and were thus heard together. One Freelin Investment Pte. Limited had entered into 3 option agreements whereby they had the option to purchase a number of shares in Grand United Holdings Bhd. and Supreme Corporation Berhad upon the terms therein contained. On 4 August Freelin entered into a syndicated credit facilities Agreement with the plaintiff and Overseas Chinese Banking Corporation whereby the 2nd, 3rd, 4th, 5th and 6th plaintiffs agreed to grant facilities amounting to RM13,710,600 for the purpose of the purchase of the shares. Under the syndicated credit facilities Agreement the liabilities of Freelin were guaranteed by the 4 defendants in the 4 appeals and 2 others.

Shortly thereafter, one Tan Koon Swan, a director of Freelin who was also a director of Supreme and Grand United was convicted and sentenced for criminal breach of trust. The defendants thereafter gave notice to the 1st plaintiff stating that they wished to terminate their respective agreements with immediate effect and that they would not be liable for any sums incurred after the date of the notices. On 15 October 1986 the solicitors for the Banks and the first (1st) plaintiff gave notice to Freelin cancelling the facilities and required Freelin to pay to the 1st plaintiff a cash collateral of 13,710,600 and claimed against each of the guarantors.

The 4 defendants raised 3 defences which they alleged would entitle the defendants to avoid and rescind the respective guarantees - [1] misrepresentation, [2] failure of conditions precedent in the Agreement and [3] breach of duty of disclosure by the plaintiffs.

Held:

[1] That the representations relief upon by the defendants were alleged to have been made by 2 directors of Freelin and as such it could not be said that the 2 Directors were acting as agents of the plaintiffs but rather that they were acting as agents of Freelin. There was therefore no misrepresentation made by the plaintiffs inducing the defendants to enter into the guarantees.

[2] In respect of the conditions precedent to the Agreement which the defendants alleged had not been satisfied, it was clear that the conditions precedent were for the benefit of the 1st plaintiff and the Banks and as such they were entitled to waive all or any of the requirements if they so wished.

[3] That in raising the defence that there had been a breach of the duty of disclosure, Counsel for the defendants appeared to suggest that these guarantees which were executed required *unberrimae fides* because of the onerous and unusual nature of such guarantees. There is

no basis for holding that the guarantees in question required *unberrimae fides* as there was nothing unusual in the nature of such guarantees.

[Appeals dismissed with costs.]

Cases referred to:

N.M. Rothschild & Sons (S'pore) Ltd & 5 Ors. v. Rumah Nanas Rubber Estates S/B [1988] 2 CLJ (Rep) 776

PP. v. Tan Koon Swan [1987] 1 MLJ

JUDGMENT

LP Thean J:

These 4 appeals in all material respects were based on the same facts and raised the same issue of law, and were heard together. Each of the appeals was against the decision of the Registrar in which, on an application under O. 14, he gave judgment for the plaintiffs for the amount claimed with Interest and costs.

The facts that give rise to the claims against the 4 defendants respectively and led to the appeals before me were in all material respects the same facts in Suit 5830 of 1986 in which the same plaintiffs claimed against the company, Rumah Nanas Rubber Estate Sdn. Bhd. and in which I also dismissed with costs the appeal by that company against the decision of the Registrar in which he gave summary judgment for the plaintiffs. The material facts have been set out in my judgment in that appeal: see *N.M. Rothschild & Sons (Singapore) Ltd and 5 Ors. v. Rumah Nanas Rubber Estates Sdn. Bhd.* [1988] 2 MLJ 210, and it is only necessary to recount them briefly for the purpose of this judgment. A company, Freelin Investment Pte Ltd. ("Freelin") on 1 August 1986 entered into 3 separate agreements ("Option Agreements") with 3 stockbrokers respectively whereby Freelin granted to them a right to require Freelin to purchase from them in toto 16,913,000 shares of RM1 each in Grand United Holdings Bhd. ("Grand United") and 5,938,000 shares of RM1 each in Supreme Corporation Bhd ("Supreme") at the prices and on the terms and conditions therein respectively provided. It was a term of each of the agreements that Freelin was to procure the issue and delivery of bank guarantees in favour of the stockbrokers to secure the performance by Freelin of its obligations under the agreements. On 4 August 1986, Freelin entered into a syndicated credit facilities agreement ("the Agreement") with the plaintiffs and Oversea-Chinese Banking Corporation Limited whereby the 2nd, 3rd, 4th, 5th and 6th plaintiffs and the said bank (collectively called "the Banks") agreed to grant to Freelin facilities in aggregate amounting to RM13,710,600 for the purpose of enabling Freelin to purchase the shares in Grand United and Supreme comprised in the Option Agreements ("Option Securities"). The facilities comprised firstly, the issue by the Banks of the bank guarantees to the 3 stockbrokers and secondly, upon purchase by Freelin of the Option Securities from the stockbrokers, the finance of the purchase price of the Option Securities. Under the Agreement, the liabilities of Freelin were secured, *inter alia*, by six guarantees, namely, one by Rumah Nanas Rubber Estates Sdn. Bhd. ("Rumah Nanas"), the defendant in Suit 5830 of 1986; one by Chong Siew Kuan, the defendant in Suit 5820 of 1986; one by Chen Lip Keong, the defendant in suit 5821 of 1986; one by Loy Hean Heong, the defendant in Suit 5822 of 1986; one by Vincent Tang Fook Lam, the defendant in Suit 5823 of 1986, and one by William Cheng Heng Jem. Each guarantee when executed subsequently was expressed to guarantee a fixed percentage of the total sum due or owing

by Freelin to the 2nd, 3rd, 4th, 5th and 6th plaintiffs, and all the guarantees were in identical forms and contained identical terms, except for the percentage of the amount guaranteed and other necessary modifications. The guarantee executed by Vincent Tang Fook Lam was dated 7 August 1986, the guarantees executed by Chong Siew Kuan and Loy Hean Heong respectively were both dated 7 August 1986, and that by Chen Lip Keong was dated 12 August 1986.

Soon thereafter, at the request of Freelin, 3 bank guarantees all dated 22 August 1986 were executed and issued by the Banks to the 3 stockbrokers respectively. Shortly thereafter, on 26 August 1986, one Tan Koon Swan, the person who played a pivotal role in these transactions and who at the material time was a director of Freelin and also a director of Grand United and Supreme, was convicted of the offence of abetting one Tan Kok Llang in committing a criminal breach of trust and was sentenced to a term of imprisonment for two years and was fined RM500,000: see *Public Prosecutor v. Tan Koon Swan* [1987] 1 MLJ 18. Following the conviction and sentence of Tan Koon Swan, all the guarantors respectively gave notices in writing to the 1st plaintiff stating that they terminated their respective guarantees with immediate effect and that they would not be liable for any sum which might be incurred after the date of the notices. On 15 October 1986, M/s. Drew & Napier, the solicitors for the Banks and the 1st plaintiff gave notice to Freelin declaring that an event of default under the Agreement had occurred and further declared that the facilities had been cancelled and required Freelin to pay to the 1st plaintiff for credit to the cash collateral account (as provided in the Agreement) a sum equal to the total guarantee outstanding, i.e., RM13,710,600, and claimed against each of the guarantors the respective amount under the guarantees.

Only one guarantor, William Cheng Heng Jem, admitted liability under the guarantee executed by him. The other 5 guarantors, i.e., the 4 defendants in these 4 actions respectively and Rumah Nanas denied liability. Consequently, five separate actions were instituted against them respectively, and in each action the plaintiffs applied under O. 14 for summary judgment against the defendants and the Registrar in each case gave summary judgment. The appeal against the Registrar's decision by Rumah Nanas had been disposed of last year. The 4 appeals by the 4 defendants respectively against the Registrar's decisions for summary judgment came before me and at the conclusion of the hearing I dismissed the appeals with costs.

Before me Mr. Lim on behalf of all the 4 defendants raised 3 defences which he said would entitle the defendants to avoid and rescind the respective guarantees: (i) misrepresentations, (ii) failure of conditions precedent in the Agreement, (iii) breach of duty of disclosure by the plaintiffs. All the defences were considered and I came to the conclusion that none of them had any merits, and I accordingly rejected them.

The misrepresentations relief upon by the defendants were centered on representations alleged to have been made to them by the 2 directors of Freelin, namely, Tan Koon Swan ("TKS") and Miss Penny Chang ("PC"). It was submitted that these representations induced them, the defendants, to enter into the guarantees in favour of the plaintiffs. It is unnecessary to deal with the representations alleged to have been made by TKS and PC in any detail. Assuming that the representations were made to the defendants by TKS and PC, as the defendants alleged, they were not made by or on behalf of the 1st plaintiff or any of the other plaintiffs. It was suggested by Mr. Lim, rather boldly, that it was reasonable for the defendants to assume that either TKS or PC or both of them were agents of the plaintiffs in

making the alleged representations. He has not however demonstrated to me the basis for such an assumption. There was no material on which Counsel could really found such a submission.

Counsel relied on the fact that the plaintiffs looked to TKS and PC to procure the guarantors: as they had to procure the guarantors for Freelin they were therefore the agents for the plaintiffs. But in procuring the guarantors they were not acting as agents for the plaintiffs. They were directors of, and were acting as agents for, Freelin. Freelin required financial assistance in order to enter into the transactions with the three stockbrokers, and in agreeing to provide the financial assistance the plaintiffs needed to safeguard and protect themselves from any default on the part of Freelin. Plainly, it was for Frelin to procure guarantors acceptable to the plaintiffs, and on the material before me it appeared that, precisely was what TKS and PC on behalf of Freelin did. What representations or inducements made out to the defendants by TKS and PC, or either of them, could in no way be attributed to the plaintiffs or could be said to have come from the plaintiffs.

Mr. Lim also sought to rely on the memorandum which the 1st plaintiff as the agent sent by telefax to the Banks inviting their participation in the provision of facilities to Freelin, and in particular, to the following statement contained in the Appendix I headed "Summary of Terms" attached to the memorandum namely. "Ultimately the banks will be looking toward the guarantors to repay the principal plus accrued interest, even though it is reasonable to assume that the relisted GUH & Supreme shares will have some value, the quantum is indeterminable but certainly inadequate for the whole principal (S$12 million)."

I failed to see the significance of this statement in relation to the defence put forward on behalf of the defendants. That statement was no more than an assessment made by the 1st plaintiff to the Banks of the risks involved, the securities provided and the standing of Freelin. On the basis of this statement it was also argued on behalf of the defendants that Freelin was a two dollar company and there was no expectation that Freelin was able to pay the amount owing to the plaintiffs and that the guarantors would be financing the entire transaction. That again could be of no assistance to the defendants. Obviously, the fact that Freelin was a two dollar company was known to the Banks and must have been known to the defendants also. In these circumstances, in providing financial assistance to Freelin, the plaintiffs would be relying on the securities provided or procured by Freelin and it must have been obvious to the defendants that the guarantees they agreed to provide would be substantially the sole security. I again failed to see how they could really complain, if upon an event of default on the part of Freelin, as had occured, the plaintiffs invoked the guarantees and sought to enforce them. The first defence was clearly unsustainable.

In respect of the second defence, it was submitted on behalf of the defendants that there were at least two major conditions precedent which had not been met, namely: (i) Condition 17 of Schedule 4 to the Agreement which required the 1st plaintiff and the majority banks (as defined therein) that the Option Securities would be re-quoted on the official lists of The Kuala Lumpur Stock Exchange and The Singapore Stock Exchange Limited, and (ii) Condition 12 of the Schedule which required the plaintiffs to obtain 5 individuals named in the Schedule to the Agreement to provide 5 guarantees, each for the relevant percentage as prescribed therein, and as these conditions had not been satisfied the Agreement had no legal effect.

In considering this defence it is necessary to examine the clause that prescribes these conditions, and that is Clause 3 which provides as follows:

> The Purchaser [Freelin] may not make its first request for the issue of a Bank Guarantee [i.e., bank guarantee to the stockbroker] until the Agent [the 1st plaintiff] has confirmed to it that the Agent has received each of the documents listed in Schedule 4 and has found them satisfactory.

Schedule 4 sets out a list of the documents required to be received by the 1st plaintiff, and paras. 12 and 17 thereof respectively provide as follows:

> 12. Five Individual Guarantees, each duly executed by an Individual Guarantor and for the relevant percentage of the Guaranteed Amount (defined in Clause 1(A) of the Individual Guarantees) set out against his name in Schedule 1, together with all other documents which may be required or necessary for the purpose of perfecting the Individual Guarantees.
>
> 17. Evidence satisfactory to the Agent and the Majority Banks that the Option Securities will be re-quoted on the Official List of each of the Stock Exchange of Singapore Limited and the Kuala Lumpur Stock Exchange within three months of the date of this Agreement.

The 5 individuals required to furnish the guarantees are set out in Part B of Schedule 1 to the Agreement, and their names and the respective percentages of the amount expressed to be guaranteed are as follows:

Name	Percentage
(i) William Cheng Heng Jem	18.18 per cent
(ii) Chong Siew Kuan	27.27 per cent
(iii) Dato Tan Chin Nam	9.09 per cent
(iv) Dato Tan Kim Hor	13.64 per cent
(v) Vincent Tang Fook lam	9.09 per cent

Of the individuals, Tan Chin Nam and Tan Kim Hor did not execute the guarantees and Low Hean Heong and Chen Lip Keong were subsequently substituted. On 21 August 1986, a supplement agreement ("the Amending Agreement") was made between Freelin, the Banks and the 1st plaintiff for such substitution.

In my opinion, Clause 3 of the Agreement did not have the effect as contended on behalf of the defendants. Under that clause, Freelin may not make a request for the issue of the bank guarantees until the condition stated therein has been complied with; but if it does make request, when the condition has not been satisfied, it is open to the 1st plaintiff and the Banks to consider whether or not to issue the bank guarantees to the stockbrokers. Clearly, as I said in the *Rumah Nanas* case and I reaffirm it here, this clause was intended for the benefit of the 1st plaintiff and Banks and they were entitled to waive, if they so wished, all or any of the requirements stated in Schedule 4. Clause 3(A) of the guarantee executed by each of the defendants expressly provides that the plaintiffs may waive compliance with any of the terms by Freelin or grant other indulgence to Freelin. At any rate, as deposed to in the affidavit of Chee Kow Chai, a director of the 1st plaintiff, the 1st plaintiff and the majority banks were satisfied with the documents they received insofar as para. 17 of Schedule 4 is concerned. In considering Clause 3 of the Agreement is also important to look at the "factual martix" of the background against which the Agreement was made and the guarantees were given by the defendants. In this connection, I would refer to what I said in the *Rumah Nanas* case, which, in my view, is equally applicable here: see [1988] 2 MLJ 210 at p. 214.

It was further contended on behalf of the defendants that the Amending Agreement provided that it was conditional upon no event of default having occurred as at 23 August 1986, and that at that time there was already an event of default in that TKS was in custody. TKS was arrested on 21 January 1986 and was on bail, and it was argued that a person who is under arrest and who has been granted bail is in law deemed to be in custody. This argument I was unable to accept. The term "custody" in relation to TKS in the factual martix in which the parties were when the Agreement was made contemplates an imprisonment of TKS by virtue of a sentence pronounced by Court in respect of the offence for which who was at that time being charged.

The last defence relied upon by the defendants was that there was failure of a duty of disclosure on the part of the plaintiffs. Again, it is not clear to me the basis on which such an argument was founded. Counsel appeared to suggest that all these 4 guarantees which the defendants executed respectively required *uberrima fides* because of the onerous and unusual nature of such guarantees. I disagreed. There was no basis for holding that the guarantees in question required *ubberrima fides*. There is nothing unusual in the nature of such guarantees; they are daily in the making in syndicated loans and credit facilities. As to the onerous terms of the guarantees, they are no more onerous than those found in standard bank guarantees nowadays, and are intended to give financial protection to the 2nd, 3rd, 4th, 5th and 6th plaintiffs in the event of any default on the part of Freelin. All the guarantees here were executed by the defendants in the presence of solicitors and there was no question that they executed the guarantees voluntarily. The terms of the guarantees were not set out in small prints or were hidden at the back of any document; they were conspicuously set out in a formal document. The defendants were at liberty, and have ample resources, to take legal advice as to the nature and the extent of the guarantees. If, however, they were foolhardy enough not to have taken legal advice, as they seemed to suggest, and rashly and boldly went ahead and executed the guarantees then they had themselves to blame. It was not suggested that any of the defendants or all of them were illiterate and were ignorant of financial or commercial matters. The fact that they were sought by TKS and PC to stand as guarantors and the fact that they were accepted as guarantors by the plaintiffs for such substantial amounts unquestionably raised the inference - an inescapable inference - that they were men of substance and of considerable commercial and financial standing. They must have considered the risks involved and they chose to enter into a commercial transaction, and obviously were motivated to do so for commercial reasons.

For the reason given, none of the defences, in my opinion, raised a trial issue.

Also found at [1988] 2 CLJ 887